T. NALLAPIRAVY & ANOR. v. MAHADEVAN & ANOR.

[O.C.J. (Gunn Chit Tuan J.)
January 27, September 8, 12 and December 31, 1977]
[Penang — Civil Suit No. 42 of 1971]

Principal and Agent — Power of attorney — Assignment of share in partnership involved in purchase and sale of land — Whether required to be in writing — Whether there was undue influence — Powers of Attorney Ordinance, 1949, s. 6 — National Land Code, s. 206.

The plaintiffs applied *inter alia* for a declaration that the irrevocable power of attorney executed by one V. Govindasamy since deceased was void and of no effect and that an assignment of the share in a partnership was null and void and of no effect. It was argued that the power of attorney was invalid as it was not registered and the assignment was invalid as it was not in writing and was made without adequate consideration and under undue influence.

Held: (1) an assignment of an equitable chose in action such as a share or an interest in a partnership would be enforced even though voluntary, provided that the donor had done everything required to be done by him to transfer it;

(2) in this case the assignment was of a share of interests in a partnership and although the partnership was involved in the purchase and sale of land, the assignment need not comply with section 206 of the National Land Code;

(3) the evidence in this case showed that the power of attorney was executed voluntarily and neither the assignment referred to in the power of attorney nor the actual execution of the power of attorney was the result of any undue influence; the suit of the plaintiffs must be dismissed and the defendants be declared as against the plaintiffs to be entitled to an equal share of the share of the late Govindasamy in the partnership.

Cases referred to:-

(1) *Tibbits* v. *George* (1836) 5 Ad. & El. 107.
(2) *Bennett* v. *Cooper* (1846) 9 Beav. 252; 50 E.R. 340.
(3) *Re Patrick* [1891] 1 Ch. 82.
(4) *Re Griffin* [1899] 1 Ch. 408.
(5) *Re Wale* [1956] 1 W.L.R. 1346, 1350.
(6) *Brandts (William) Sons & Co. Ltd.* v. *Dunlop Rubber Co. Ltd.* [1905] A.C. 454, 462.
(7) *Re McArdle* [1951] Ch. 669; [1957] 1 All E.R. 905 C.A.
(8) *Ex parte Hall* (1874) 10 Ch. D. 615.
(9) *Kammallambal* v. *Arumugum Ramiah* (1953) 3 M.C. 40.
(10) *Slingsby's Case* 77 E.R. 77.
(11) *Morley* v. *Bird* 4 Revised Reports 106, 108.
(12) *Perkins* v. *Baynton* 28 E.R. 1022.

CIVIL SUIT.

T. Subbiah for the plaintiffs.

W.S.W. Davidson for the defendants.

Gunn Chit Tuan J.: The plaintiffs as administrators of the Estate of V. Govindasamy s/o Vengadasalam Pillay alias V. Govindasami Pillai, deceased, sued one M. Ratnavale and M. Kathiresan Chettiar in February, 1971, for the following:—

"(1) A Declaration that the Irrevocable Power of Attorney executed by the said V. Govindasamy s/o Vengadasalam Pillay alias V. Govindasami Pillai on the 4th day of May, 1968 (Registered in the Registry of the High Court, Penang on the 29th day of January, 1969 as No. P.A. 47/69) is null and void and of no effect whatsoever;

(2) A Declaration that the Assignment dated the 1st day of May, 1968 (referred to in the said Irrevocable Power of Attorney), by the said V. Govindasamy s/o Vengadasalam Pillay alias V. Govindasami Pillai of all his shares rights titles and interests of and to the incomes profits and benefits of and arising out of the joint venture known as 'Sitiawan Estates Group Syndicate' to the defendants is also null and void and of no effect whatsoever;

(3) A Declaration that all dealings and transactions made, done and transacted by the defendants whatsoever and howsoever under and by virtue of the said Irrevocable Power of Attorney and the said Assignment are null and void and of no effect whatsoever;

(4) An injunction that the defendants by themselves or their servants or agents or otherwise howsoever be restrained forthwith from dealing or transacting in anyway howsoever with the shares rights titles and interests of the estate of the said V. Govindasamy s/o Vengadasalam Pillay alias V. Govindasami Pillai, deceased, of, in and to the joint venture known as 'Sitiawan Estates Group Syndicate';

(5) An order that all entries and registrations of the said Irrevocable Power of Attorney and the said Assignment in the Registry of the High Court, Penang, and at all other Registries Land Offices, departments and offices wherever they may be entered or registered, be expunged or cancelled from the records thereat;

(6) Damages;

(7) Costs;

(8) Further or other relief."

As the second defendant abovenamed failed to enter an appearance, judgment was given against him by H.S. Ong J. (as he then was) on March 3, 1972, on a Notice of Motion filed by the plaintiffs in February, 1972. By the time this suit came up for hearing before me in 1977 the first defendant had died and on January 27, 1977, I allowed, by consent of the parties, an application by counsel for M. Ratnavale (deceased) made by way of Summons-in-Chambers to amend the title of the pleadings by substituting the names "Mahadevan s/o Mahalingam and Sandrasegara s/o Mahalingam, as the Executors and Trustees of the Estate of Ratnavale s/o Mahalingam alias Mahalingam Ratnavale" (hereinafter referred to as "the first defendants") in place of M. Ratnavale (deceased).

Two witnesses gave evidence for the plaintiffs. According to their first witness, Samiayah s/o Servai (PW1), who is a broker and knew the late Govindasamy with whom he has had business dealings, the latter and a few other people, namely, K. Chettiar, S. Narayanasamy, Sreenivasa Reddiar and others, formed a group known as the "Sitiawan Estate Group Syndicate" to purchase Sitiawan Estate for about 7¾ — 8-million dollars. Govindasamy raised the money whilst the others were working partners. As far as he knew, Govindasamy paid more than $400,000/- and raised money by mortgaging some of his properties. The said estate was bought in the year 1966 for fragmentation and as far as he knew, Govindasamy was to get 25% of the profits which in his estimation would have been about $200,000/- in 1968. This witness also said that all the four persons referred to by him in the said group were friendly at first, but later on the late Govindasamy's relationship with Narayanasamy and K. Chettiar deteriorated because they had acted on their own in the fragmentation business without consulting him. PW1 also knew the late M. Ratnavale, who was a sleeping partner of the syndicate. The late Govindasamy was at first quite friendly with the late Ratnavale, but their relationship also became strained later on. Although PW1 knew the late Govindasamy well, he said he did not know whether the

latter had any relatives in Malaysia, but in his opinion he did not think that the late Govindasamy would have assigned his interests for $3,000/-.

In cross-examination, PW1 stated that the late Govindasamy was not only a self-made man with properties in Penang and Province Wellesley, but was also an experienced businessman. He also stated that he did not know what were the arrangements for some of the contributing partners and only knew how much some of the partners contributed. He admitted that he did not know that the late Govindasamy had executed an agreement to the effect that all contributing partners were entitled to share in the profits of the group or that Narayanasamy was claiming 30% of the profits which had been agreed to by the late Govindasamy. PW1, however, said that he heard that the money raised on mortgage by the late Govindasamy was repaid by the syndicate and agreed that the properties remain charged because there was still a dispute between the lending company and the administrators of the late Govindasamy's estate regarding the amount to be repaid to the said company.

The plaintiffs' second witness was Mr. Frederick Weatherly (PW2), a certified public accountant who was appointed receiver of the Sitiawan Estate Syndicate in 1969 by the High Court at Ipoh in an action initiated by the said Reddiar and the late Ratnavale. At that time the accounts of the syndicate were in a chaotic state and there was a dispute as to who were the partners of it. In the opinion of this witness, the amount which would finally be available for distribution was difficult to estimate, but he considered that eventually all the partners should *before tax* have a hope of receiving a sum of $500,000. He could only say that each partner, if they were treated as equal partners, might get about $125,000 *before tax*. Therefore, taking a broad view he would say that each partner might get about $60,000/- after tax if the profits were divided equally between four partners. This witness for the plaintiffs, however, in contradiction to PW1, said that he would not be surprised if the late Govindasamy had assigned all his rights in the said syndicate for $3,000/-.

In cross-examination, Mr. Weatherly said that other than a sum of $16,000/- paid to one Kasi Chettiar, none of the partners has received anything. There were still a large number of disputes, but subject to income tax clearance it should not affect a first distribution sometime next year. This witness confirmed that a number of people other than the four ostensible partners also contributed to the syndicate. The late Ratnavale and one Manilal contributed $70,000/- each. PW2 had not seen any documents setting out clearly and unmistakably who the partners were, but assuming that other partners were admitted, he agreed that that might affect Govindasamy's share if the said Manilal and others did not accept the offers made to them as their shares of the profits.

The first defendants also called two witnesses. Mr. Jag-Jit Singh (DW1), an advocate and solicitor practising in Penang, said that he recognised his signature on the irrevocable power of attorney marked "B". He recalled it being executed and attested before him. The document was drafted by his former articled clerk, Mr. Subash Chandran (DW2), who is now an advocate and solicitor. All three parties signed the document and as the late Govindasamy did not know English, he instructed DW2 to make sure that Govindasamy knew what the document was all about. DW1 has known Govindasamy for a considerable time and he has also acted for him in a number of matters. According to him, the late Govindasamy was a very shrewd man and was not the sort of person to be taken for a ride, and his impression was that the late Govindasamy could well look after his own business affairs. DW1 was fully satisfied that when the late Govindasamy put his signature on Exhibit "B", he knew what it was all about.

In cross-examination, this witness confirmed that it was Govindasamy himself who had instructed him to prepare the irrevocable power of attorney. He was only concerned to find out whether Govindasamy knew what he was signing and was satisfied that the late Govindasamy signed the document voluntarily.

Mr. Subash Chandran spoke in Tamil to all three signatories of Exhibit "B". He was also of the impression that the late Govindasamy was a shrewd businessman and understood his own instructions regarding Exhibit "B", which he signed in their presence. The contents of the document were interpreted and explained to him in the presence of DW1. Both DW1 and DW2 made sure that everything was in order before the parties signed the irrevocable power of attorney, which was registered in January 1969 on the instructions of the donees.

In cross-examination, Mr. Subash Chandran said that he was instructed to keep the document until one of the two donees asked him to register it. Like DW1, DW2 also knew the late Ratnavale and he too confirmed that the two deceased were good friends and had been to their office together on other occasions.

Counsel for the first defendants, Mr. Davidson, contended that the irrevocable power of attorney (Exhibit. "B"), which was drawn up on May 4, 1968, was evidence of an assignment. The recital in it clearly admits that an assignment was made by the late Govindasamy. He submitted that Exhibit "B" was *prima facie* evidence of a valid assignment and with regard to paragraph 9(a) of the statement of claim, which averred that the said assignment was not in writing and "bad in law, null and void and unenforceable *ab initio* the making thereof and at all times", referred to the following paragraph at page 492 in Volume 4 of *Halsbury's* Laws of England (3rd Ed.): —

"1018. *Mode and form of assignment immaterial.* No form of words is required for an equitable assignment; the only thing that is necessary is to make the meaning plain. The assignment may be by word of mouth, unless in the particular case writing is required by law, and no particular form of words is necessary so long as they clearly show an intention that the assignee is to have the benefit of the chose in action. It may be addressed either to the debtor or to the assignee. An agreement amounting to an equitable assignment may be express and written or may even be made out from a course of dealing between the parties."

It is therefore clear that an equitable assignment can also be made by word of mouth (see *Tibbits* v. *George*[1]). Moreover, no form of words is necessary so long as the words used clearly show the intention of the assignor. Counsel also referred to the case of

Bennett v. *Cooper*,[2] where it was held that a deed poll in the form of a power of attorney amounted in equity to an assignment or to a covenant to assign. In this particular case, there is no law which requires the assignment to be in writing and the fact that there is no other evidence in writing of the assignment in question therefore did not result in the said assignment being bad in law, null and void and unenforceable *ab initio* the making thereof and/or at all times.

Next, as regards paragraph 9(b) of the statement of claim, which averred that there was no consideration for the assignment or alternatively that the consideration of $3,000/- was not a real or legal or adequate or sufficient consideration, counsel for the first defendants pointed out that consideration was not an essential requirement of a valid and complete assignment, although there was consideration in this case that was acknowledged in the irrevocable power of attorney marked "B". It is correct, as submitted, that consideration is not essential for the equitable assignment of a legal or equitable chose provided that the assignor has done everything required to be done by him in order to transfer the chose in action (see *Re Patrick*;[3] *Re Griffin*[4]). As regards an assignment of an equitable chose such as this, it would be relevant here to refer to the following words of Upjohn J. in the case of Re *Wale*,[5] where His Lordship said as follows: —

"Another familiar principle is that an assignment of an equitable estate need not be in any particular form. As Lord Macnaghten said in *Brandt's (William) Sons & Co. Ltd.* v. *Dunlop Rubber Co. Ltd.*:[6] 'The language is immaterial if the meaning is plain.' That, in my judgment, applies as much to a voluntary assignment as to one for valuable consideration. . . ."

It is therefore settled law that an assignment of an equitable chose in action, such as a share or interest in a partnership, will be enforced even though voluntary, provided that the donor has done everything required to be done by him in order to transfer it (see *Re McArdle*[7]).

As stated above, counsel for the first defendants pointed out that there was consideration in this case and he also submitted that a court would not inquire into adequacy of consideration and referred to the following passage at page 116 in Vol. 8 of *Halsbury's* Laws of England (3rd Ed.):—

"202. *Adequacy.* An act of forbearance which constitutes the consideration for a promise must be of some value in the eye of the law, but need not be an adequate return for the promise. The court will not inquire into the adequacy of the consideration, but will leave the parties to make the bargain for themselves. This rule, generally speaking, applies in equity as well as at law. The inadequacy of consideration may be so great as to raise a presumption of fraud or undue influence in cases where there are other circumstances indicating fraud or where a fiduciary relationship exists between the parties, or one is in fact under the influence of the other. A merely nominal consideration does not prevent a contract or settlement from being regarded as voluntary so far as third persons are concerned."

In this case, therefore, it was not for the court to enquire whether the $3,000/- was adequate consideration for the assignment of the late Govindasamy's interests in the syndicate to the defendants. But, considering the evidence of Mr. Weatherly that each partner of the syndicate could only get not more than $60,000/- after tax and that with the number of disputes still not settled yet in the year 1977, it was not surprising that the late Govindasamy, as a shrewd businessman, decided in 1968, to assign his interests for $3,000/-.

On the averment in paragraph 9(e) of the statement of claim that the irrevocable power of attorney was not registered under the provisions of the Powers of Attorney Ordinance, No. 64 of 1949, until after the death of the donor, counsel for the first defendants referred to section 4 of the said Ordinance and contended that that section did not impose any time limit within which a power of attorney had to be deposited in the office of the Assistant Registrar. He further argued that the equitable assignment was not in any case dependent on the power of attorney.

With reference to paragraph 9(f) of the statement of claim averring that "no notice was ever given by the defendants, or either of them, to the other partners of the said partnership or syndicate, either before or after the death of the said V. Govindasamy s/o Vengadasalam Pillay alias V. Govindasami Pillai, of the alleged Assignment and Irrevocable Power of Attorney", counsel for the first defendants referred to the following paragraph at page 498 in Vol. 4 of *Halsbury's* Laws of England (3rd Ed.): —

"1026. *Notice not necessary as between assignor and assignee.* As between the assignor and the assignee, an equitable assignment, whether voluntary or for value, is absolute and complete without notice having been given to the debtor or fundholder, for notice does not render the title perfect, and formerly was not even a step in the title. Moreover, notice is not necessary as against third persons who stand in the same position as the assignor, such as persons claiming under a subsequent assignment as volunteers, or a creditor who has obtained a charging order, or an order appointing a receiver, or a garnishee order, even though in the last case the judgment creditor gives notice to the trustee before the assignee, or the trustee in bankruptcy of the debtor."

But it should be pointed out here that in order to make an assignee's title effective against the debtor or fundholder and third parties, notice of the assignment must be given to the debtor or fundholder (see paragraph 42 in Vol. 6 of *Halsbury's* Laws of England (4th Ed.)).

Lastly, it was pointed out by Mr. Davidson that there was no evidence, as alleged, that the defendants allowed the late Govindasamy to deal with his share in the partnership or syndicate as if he was at all times still the beneficial owner thereof until his death. There was also no evidence, as alleged in paragraph 10 of the statement of claim that the assignment and the irrevocable power of attorney were obtained by the defendants from the late Govindasamy as a result of undue influence, fraud or fraudulent misrepresentation. There was no special relationship in this case and the defence witnesses were neither questioned nor challenged on this point. There was also no evidence to show that the late Govindasamy had ever, if at all, repudiated the assignment.

Counsel for the plaintiffs, Mr. Subbiah, also referred to the Powers of Attorney Ordinance, No. 64 of 1949, and pointed out that a power of attorney has no validity to create any power until registration with the Assistant Registrar. He then referred to paragraph 546 in page 244 of Vol. 1 of *Halsbury's* Laws of England (3rd Ed.) on the effect of death of an

agent in the case of an agency which rests on personal relationship, and pointed out that Ratnavale, the former first defendant, has died. The power of attorney in this case has been declared to be irrevocable in the deed itself and was, as pointed out by counsel for the first defendants, not affected by the death of the donor by reason of section 6 of the Powers of Attorney Ordinance, 1949, which is as follows:—

"6.(1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser —

(a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and

(b) any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(c) neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power."

But the death of one of the donees in this case would appear to terminate the joint agency granted to the defendants, though, as correctly pointed out by counsel for the first defendants, prayer (1) in the statement of claim in this suit was not to the effect that the power of attorney in question "ceased to be valid" on the death of Ratnavale, one of the donees, but the declaration sought by the plaintiffs was that "the Irrevocable Power of Attorney purported to have been executed by the said V. Govindasamy s/o Vengadasalam Pillay alias V. Govindasami Pillai on the 4th May, 1968 (registered in the Registry of the High Court, Penang, on the 29th day of January, 1969, as No. P.A. 47/69) is null and void and of no effect whatsoever", which declaration I therefore declined to make.

Next, counsel for the plaintiffs submitted that the assignment should have been in writing since it referred to interests in land, the assignment of which was governed by section 206(1) of the National Land Code, which is as follows:—

"206.(1) Subject to the following provisions of this section —

(a) every dealing under this Act shall be effected by an instrument complying with the requirements of sections 207 to 212; and

(b) no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen."

He also referred to the case of *Ex parte Hall, In re Whitting*,[8] where it was held that as rent was an interest in land, an agreement to assign future rent was one which, by virtue of the Statute of Frauds, could not be proved by parol evidence. With respect, counsel for the plaintiffs has missed the point here because there were no dealings in this case with respect to alienated lands and interests therein such as those specified in Parts Fourteen to Seventeen of the National Land Code (Act 56 of 1965). He has also not considered sub-section (3) of section 206 of the National Land Code, which is as follows:—

"(3) Nothing in sub-section (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein."

Here was a case of an assignment of a share or interests in a partnership, which incidentally was involved in the purchase and sale of land. I cannot see how the National Land Code is applicable, and the English Statute of Frauds too does not apply here. The above-quoted case of *In re Whitting* which concerned an assignment of future rents from land was also not relevant. I therefore considered that there were no merits in counsel's contention on this point.

Reference was then made by Mr. Subbiah to the case of *Kammallambal* v. *Arumugam Ramiah*,[9] which was an application to declare void a gift of immovable property made by the plaintiff to the defendant on the ground of undue influence. In that case the plaintiff and her two adopted children had been supported by the defendant since the death of the former's husband, and while this relationship subsisted, the plaintiff conveyed her property to the defendant. It was found that the defendant was in a position of active confidence in relation to the plaintiff. The burden was therefore on the defendant to show that the gift was not made as a result of the influence, which, by reason of the relationship, he exercised over her. It was held, *inter alia*, that where advice was taken by the donor, it should be shown that the advice was given by a qualified and independent person who had knowledge of the relevant circumstances, and that it was such that a competent and honest adviser would give if acting solely in the interests of the donor. The effect of the transaction must be so fully explained to the donor as to satisfy the court that the donor was acting independently of any influence of the donee and with full appreciation of what he was doing. It was held in that case that the defendant had failed to prove that the gift was not made as a result of undue influence. In this case, counsel for the plaintiffs submitted that because the late Govindasamy was single and had no relatives in Malaysia and because he and the late Ratnavale were good friends, therefore in the circumstances of this case the donees were in a position of active confidence in relation to the donor and it was for them to show that the assignment was not made as a result of undue influence exercised over the donor. Counsel also supported his contention by referring to section 111 of the Evidence Act, which is as follows:—

"111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

Although there was no evidence in this case to show that the late Govindasamy had sought the advice of Mr. Jag-Jit Singh, an advocate and solicitor (DW1), the latter's evidence and that of Mr. Subash Chandran (DW2) were sufficient to prove that the donor was acting independently of any influence of the donees and was fully conscious and appreciative of what he was doing. I was satisfied and found on the balance of probabilities that neither the assignment referred to in the irrevocable power of attorney (Exhibit "B") nor the actual execution of that power of attorney was the result of any undue influence. In fact, the evidence showed and I found that he had executed the irrevo-

cable power of attorney voluntarily. I would add that I did not find any evidence of a special relationship or active confidence in this case whereby the provisions of section 111 of the Evidence Act should be applied.

Finally, counsel for the plaintiffs submitted that assuming the assignment was valid, then the interests of the late Ratnavale had passed over to the second defendant and in support of this contention he referred to the following paragraph in pages 515 and 516 of Vol. 4 of *Halsbury's* Laws of England: —

"1063. *Death.* Upon the death of an individual, all choses in action to which he was entitled pass as a general rule to his personal representative. If he dies intestate, until an administrator is appointed, all his property vests in the President of the Probate, Divorce and Admiralty Division. There are, however, some exceptions. For instance, the interest that the deceased person has in a chose in action jointly with another person does not pass to his personal representative, but to the other joint holder, unless they are entitled as partners in trade, in which case the beneficial interest in the deceased person's share passes to his executor, but the right to recover it passes to the surviving partner."

In reply, Mr. Davidson referred to the words "jointly and severally" used in Exhibit "B" and submitted that there may be joint and several obligations, but not rights. He quoted *Slingsby's Case,*[10] where it was held *inter alia* that an interest cannot be granted jointly and severally, but a power of authority may be joint and several. The question here, counsel for the first defendants submitted, was whether the assignment created joint interests with right of survivorship or did it create interests in common? He pointed out that words of severance had been used in the power of attorney in question and referred to the case of *Morley* v. *Bird,*[11] where it was held that an interest given to two or more either by way of legacy or otherwise is joint, unless there are words of severance, as "equally among", etc., or an inference of that sort arises in equity from the nature of the transaction; as in partnerships, a joint mortgage, etc. In this case, I found that it had been recited in Exhibit "B" that the $3,000/- had been jointly paid by the late Ratnavale and the second defendant, and by the use of words of severance such as "severally" and "to hold unto them in equal shares", an intention had been shown to make the donor's assigned share in the partnership or syndicate interests in common. Reference was also made to the case of *Perkins* v. *Baynton,*[12] where it was held that a money legacy to two (not executors) "jointly and between them" — is not a joint-tenancy; but is a tenancy in common, the words meaning the same as "to be equally divided between them". This authority, of course, strengthened the view that in this case there was a tenancy in common and that on the death of Ratnavale, his half share in the interests of the late Govindasamy in the partnership assigned to them did not pass over to the second defendant as claimed by counsel for the plaintiffs.

Lastly, I agreed with counsel for the first defendants that there was no evidence at all of damages suffered by the plaintiffs and in the circumstances of the case, I therefore dismissed their suit and, in allowing the counter-claim of the first defendants, declared that they, as against the plaintiffs, were entitled to an equal share of the late Govindasamy's share deriving, whether by return of capital, payment of profits or otherwise, from the said syndicate. I also awarded the first defendants the costs of this action.

Order accordingly.

Solicitors: *Subbiah & Co.; Lewis & Co.*

MRS. KOK WEE KIAT v. KUALA LUMPUR STOCK EXCHANGE BHD. & ORS.

[O.C.J. (Abdul Hamid J.) May 30, September 8 and December 23, 1977]

[Kuala Lumpur — Civil Suit No. 1609 of 1974]

Practice and Procedure — Application that particulars filed in reply to defence be struck out — Particulars — Particulars setting out evidence — Libel — Conspiracy to defame — Whether claim of conspiracy to defame has merged with claim for libel — R.S.C. 1957, O. 19 rr. 22 and 27, O. 25 r. 4.

Torts — Libel — Conspiracy to defame — Whether claim of conspiracy to defame merged with claim for libel.

There were two applications in this case (a) one by the ninth defendant for an order that the plaintiff's action be struck out and (b) by the second to eighth defendants for an order that the plaintiff's claim for damages for conspiracy to publish a defamatory statement of and concerning the plaintiff be struck out. In both applications there was a common prayer that the particulars filed in reply to the defence of the second to ninth defendants be struck out.

It was agreed that (1) the claim founded on conspiracy to defame had merged with the claim for libel and (2) that the particulars filed by the plaintiff were in contravention of Order 19 rule 22 in that evidence by which the facts were to be proved was pleaded.

Held: (1) the claim to "conspire to defame" had merged with the claim for libel and therefore the application that the allegations as to conspiracy to defame in the statement of claim should be struck out should be allowed;

(2) only material facts must be pleaded but not evidence by which they were to be proved. A substantial part of the particulars given by the plaintiff were clearly evidence and ought to be struck out;

(3) the plaintiff be ordered to file fresh particulars which should be in strict compliance with Order 19 rule 22 of the Rules of the Supreme Court.

Cases referred to:-

(1) *Ward* v. *Lewis & Ors.* [1955] 1 W.L.R. 9.

(2) *Phillips* v. *Phillips & Ors.* (1878-9) 4 Q.B.D. 127.

(3) *Bruce* v. *Odhams Press Ltd.* [1936] 1 K.B. 697.

CIVIL SUIT.

Wong Weng Kwai for the plaintiff.

Eugene K.H. Lye for 2nd to 8th defendants (except 4th defendant).

Ng Ek Teong (*V. Ponniah* with him) for the 9th defendant.

Abdul Hamid J.: There are two applications be-before this Court, (a) that of the 9th defendant for an order that the plaintiff's action against him be struck out, and (b) by the 2nd, 3rd, 5th, 6th, 7th and 8th defendants for an order that the plaintiff's claim against them in paragraph 2 of the amended statement of claim and on the indorsement of claim in the writ of sum-